

FEDERAL MAGISTRATES COURT OF AUSTRALIA

0 BUNNAG v MINISTER FOR IMMIGRATION & 1 [2007] FMCA
ANOR 1843

MIGRATION – Migration Review Tribunal – whether jurisdictional error.

Evidence Act 1995 (Cth), s.56(2)

Migration Act 1958 (Cth), ss.276, 352(4), 359A(4)(b), 359(1), 359C(1), 362(3), 363A, 373, 375, 375A, 376, 379A, 379G(2), and Part 5 Division 5, Division 8A

Migration Regulations 1994 (Cth), reg. 1.15(A)(1A)(b), Schedule 2, cl. 801,
820

Abebe v Commonwealth (1999) 197 CLR 510

Minister for Immigration and Multicultural Affairs v Jia Legeng [2001] 205 CLR 507

Minister for Immigration and Multicultural and Indigenous Affairs v Lay Lat
(2006) 151 FCR 214; [2006] FCAFC 61

Minister for Immigration & Multicultural & Indigenous Affairs v SGLB (2004)
207 ALR 12; [2004] HCA 32

Minister for Immigration & Multicultural & Indigenous Affairs v SZFDE
[2006] FCAFC 142

Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323

NBKJ v Minister for Immigration and Multicultural and Indigenous Affairs
[2005] FCAFC 238

SZCIG v Minister for Immigration & Multicultural & Indigenous Affairs
[2006] FCAFC 62

WAGP v Minister for Immigration and Multicultural and Indigenous Affairs
[2006] FCAFC 103

Applicant: NAVAPHAN BUNNAG

First Respondent: MINISTER FOR IMMIGRATION & CITIZENSHIP

Second Respondent: MIGRATION REVIEW TRIBUNAL

File number: PEG 102 OF2006

Judgment of: Lucev FM
Hearing date: 6 February 2007
Date of last submission: 6 February 2007
Delivered at: Perth
Delivered on: 12 November 2007

REPRESENTATION

Counsel for the Applicant: Mr T V Hurley
Solicitors for the Applicant: Mark Andrews Legal
Counsel for the Respondents: Mr J D Allanson
Solicitors for the Respondent: Australian Government Solicitor

ORDERS

- (1) The name of the first respondent be amended to “Minister for Immigration and Citizenship”.
- (2) The application be dismissed.
- (3) The applicant pay the first respondent’s costs in the amount of \$5000 within 14 days.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
PERTH**

PEG 102 of 2006

NAVAPHAN BUNNAG
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Background facts

1. The applicant is a Thai national. He originally entered Australia on a sub-class 670 visa in April 1993.¹ The applicant variously departed from and re-entered Australia on a number of occasions between April 1993 and February 1996, holding valid visitor and student visas.
2. The applicant's last entry to Australia was on 4 February 1996. He entered as the holder of a student visa which ceased on 15 March 1997.²
3. The applicant seemingly remained in Australia, possibly unlawfully, prior to making an application on 19 September 2000 for migration to Australia as the partner of Leisha Buckley.³

¹ CB 84.

² CB 82.

³ "Sponsor".

4. The first respondent, the then the Minister for Immigration and Multicultural Affairs,⁴ refused the applicant's visa application.⁵ The delegate of the Minister determined that the applicant and Sponsor were not in a genuine and continuing marital relationship.⁶
5. On 8 December 2004 the Applicant sought review by the second respondent, the Migration Review Tribunal.⁷
6. Prior to making a decision the Tribunal:
 - a) received submissions;⁸
 - b) considered the departmental case file;⁹
 - c) had a hearing on 9 November 2005 at which evidence was taken from the applicant and his employer;
 - d) at the 9 November 2005 hearing the applicant told the Tribunal that the Sponsor had attended, but had not remained in the building, because she was unwell;¹⁰ and
 - e) received a letter from the applicant's employer concerning the applicant's efforts to obtain medical reports and doctor's assessments as to the Sponsor's medical condition;¹¹ and
 - f) appears on 5 December 2005 to have sent the applicant a letter requesting further information concerning:
 - i) the applicant's relationship with the Sponsor;
 - ii) the Sponsor's medical condition;
 - iii) periods of hospitalisation undergone by the Sponsor; and
 - iv) the nature and extent of support provided to the applicant by the Sponsor.¹²

⁴“Minister”.

⁵ CB 221-225.

⁶ CB 224.

⁷“Tribunal”. CB 228.

⁸ CB 369.

⁹ CB 369.

¹⁰ CB 375.

¹¹ CB 334. See also further letters at CB 337 and CB 338 received by the Tribunal.

¹² CB 375 at para. 41 and CB 341.

7. On 6 January 2006 the applicant sought further time to respond to the Tribunal's 5 December 2005 letter.¹³
8. On 10 January 2006 the applicant advised the Tribunal that medical reports in relation to the Sponsor's medical condition may take many months to finalise.¹⁴
9. On 18 January 2006 the applicant provided information to the Tribunal, including statutory declarations, and advised the Tribunal that the hospital treating the Sponsor was not willing to release any information concerning the Sponsor's medical condition.¹⁵
10. The Tribunal sent the applicant a notice under s.359A of the *Migration Act 1958* (Cth)¹⁶ on 22 February 2006 inviting the applicant to comment on certain information, and in particular:
 - a) information gathered by officers of the Department of Immigration and Multicultural Affairs;¹⁷ on two visits to the applicant's home at Sil Street in Bentley on 9 September 2004 and 10 November 2004; and
 - b) information obtained from Centrelink records that the Sponsor's address was not Sil Street in Bentley in November 2004, and further, that the Sponsor had told Centrelink that she and the applicant had separated in May 2002.¹⁸
11. The applicant responded to the Tribunal by letter dated 28 February 2006. It would appear that the letter was not received until 7 March 2006.¹⁹
12. The Tribunal's decision was delivered on 28 March 2006.²⁰

¹³ CB 341.

¹⁴ CB 342.

¹⁵ CB 347.

¹⁶ "Migration Act".

¹⁷ "Department".

¹⁸ CB 355-357.

¹⁹ CB 362.

²⁰ CB 378-384 ("Tribunal Decision").

Tribunal Decision

13. The Tribunal considered whether at the time of the decision the applicant and Sponsor were in a marital relationship.²¹
14. Each of the matters required to be considered by the Tribunal under regulation 1.15A(3)(a)-(d) were considered by the Tribunal by reference to the evidence on each of those matters.²²
15. The Tribunal also considered the matters set out in reg.1.15A(1A)(b)(i)-(iii) of the *Migration Regulations* in significant detail.²³
16. The Tribunal considered in some details the Sponsor's medical condition, in particular her so-called "mental conditions".²⁴ The Tribunal invited the applicant to provide further information concerning the Sponsor's medical condition, and to the extent that the applicant was able to do so, the applicant did so.²⁵ The Tribunal specifically had regard to the evidence, such as it was, of the Sponsor's "mental conditions". See for example:
 - a) the applicant and Sponsor having separate bedrooms due to the Sponsor's "mental conditions";²⁶
 - b) no medical evidence having been provided as to the nature or extent of the Sponsor's "mental conditions";²⁷
 - c) the limitation on the ability of the applicant and Sponsor to join and undertake social activities by reason of the Sponsor's "mental conditions";²⁸
 - d) the applicant's claim that he emotionally supported the Sponsor during her illness, and the evidence of the degree of

²¹ *Migration Regulations 1994* (Cth), cl.801.221 and reg.1.15A(3)(a)-(d) ("*Migration Regulations*").

²² CB 379-380 at para. 54.

²³ CB 380-383 at paras. 55-65.

²⁴ CB 379.

²⁵ See CB 375 at para. 41 and CB 376 – 377.

²⁶ CB 379.

²⁷ CB 379.

²⁸ CB 380.

companionship or emotional support the Sponsor receives, or whether the relationship was a long term one;²⁹

- e) the acceptance by the Tribunal that the Sponsor has “some unspecified health issues”, and that they “may play some role in the lack of evidence there is very little evidence ... from which an inference of mutual commitment could be drawn”;³⁰
- f) the applicant’s explanation of the living arrangements at Sill Street with the Sponsor;³¹ and
- g) the fact that the Tribunal had “no evidence before it regarding the nature, extent and duration” of the Sponsor’s illness, and it was therefore not possible to attach much weight to it as an explanation for the Sponsor’s frequent absences from the applicant’s home, and that the Tribunal was not satisfied of an alleged reconciliation, it not being supported by any evidence from the Sponsor.³²

17. The Tribunal also had regard to other information including:

- a) the evidence gathered by the officers of the Department during visits to the home in 2004;³³
- b) the various limitations of the evidence, having regard to the alleged continuing five year relationship between the applicant and the Sponsor, including there being relatively few:
 - i) photographs of the couple together in a variety of places and with a variety of people;
 - ii) documents in joint names;
 - iii) detailed statements in support of the relationship provided by the couple or friends;
 - iv) indications from the Sponsor that she was in a genuine and continuing relationship; and

²⁹ CB 380.

³⁰ CB 380.

³¹ CB 381.

³² CB 383 at para. 63.

³³ CB 303 at para. 64.

- v) indications of the nature, extent and duration of the Sponsor's health issues.³⁴

Evidence

18. In arriving at its judgment this Court has not had regard to documents other than those before the Tribunal at the time of the Tribunal Decision. In particular the Court has not had regard to subsequently discovered (as a result of freedom of information requests) emails, as they go to the Tribunal's decision-making process, which are matters into which the Court cannot inquire.³⁵

Grounds of the application

Ground 1

19. The applicant alleges error by the Tribunal, in law, because of an asserted conclusion that the applicant and Sponsor were in a lawful marriage at the date of the application (as opposed to the date of the Tribunal Decision), and that consequently there was no need to decide when that marriage ceased to satisfy reg. 1.15A(1A)(b) of the *Migration Regulations*.
20. What the Tribunal actually found was that the applicant and Sponsor were married on 7 December 2000, validly, and that at the time of the Tribunal Decision they remained legally married.³⁶ However, for the purposes of reg. 1.15(1A) the Tribunal was required to consider whether the applicant and Sponsor were not only married, but also met the criteria in reg.1.15A(1A)(b), namely that the Minister must be satisfied that:
- a) the applicant and Sponsor had a mutual commitment to a shared life as husband and wife to the exclusion of all others;
 - b) their relationship was genuine and continuing; and
 - c) they lived together or did not live separately and apart on a permanent basis.³⁷

³⁴ CB 302 at para. 61.

³⁵ *Migration Act*, s.373; *Evidence Act 1995* (Cth), s.56(2).

³⁶ CB 378 at para. 52.

³⁷ *Migration Regulations*, reg. 1.15(A)(1A)(b).

21. The Tribunal did not, and was not required to, make a finding as to the state of their marital relationship between the applicant and Sponsor under reg. 1.15A(1A) of the *Migration Regulations* as at December 2000.
22. The applicant asserts that the Tribunal “appears” to have ignored the effect of reg. 1.15A(5), which provides that if two or more persons have been living together at the same address for six months or longer that fact is to be taken to be strong evidence the relationship is genuine or continuing. The Tribunal did not ignore this requirement. There is specific reference to reg. 1.15A(5) in the heading prior to paras. 57-58 of the Tribunal Decision. The Tribunal considered the issue, and concluded that the Applicant did care for the Sponsor, but only intermittently, and that he was unaware of the Sponsor’s day to day whereabouts.³⁸ The Tribunal has not ignored the reg. 1.15A(5) requirement: rather its effect has been displaced by the weight of other evidence.
23. The Tribunal found, and it was a finding available to it on the basis of the evidence, that there was not sufficient evidence for it to be satisfied that:
 - a) the applicant and Sponsor were in a genuine and continuing relationship at the time of the Tribunal Decision; and
 - b) at the time of the Tribunal Decision the couple lived together or they did not live apart on a permanent basis.
24. There was no error of law by the Tribunal as alleged in Ground 1.

Ground 2

25. The applicant says that the Tribunal erred in law in proceeding to decide the application on 28 March 2006.
26. Although the Tribunal’s letter of 5 December 2005 to the applicant is not in evidence before this Court, it can be presumed from the Tribunal’s Decision that it was sent on 5 December 2005 and that it sought further information as to:
 - a) any additional information regarding the applicant’s relationship with the Sponsor;
 - b) the details of the Sponsor’s medical conditions;

³⁸ CB 381 at para. 58.

- c) the periods of time in which the Sponsor was hospitalised during the relationship; and
 - d) the nature and extent of any support provided by the applicant to the Sponsor.
27. On 6, 10, 19 and 31 January 2006 various information was provided to the Tribunal in relation to the Tribunal's request for additional information in its 5 December 2005 letter. The responses indicated that the applicant was unable to obtain the Sponsor's medical records and any indication of times that she had spent hospitalised, and that a current medical report would not be completed for some time.³⁹
28. In passing, it might be observed that it is curious that the applicant had to rely upon, or seek to rely upon, the release of hospital records, to indicate to the Tribunal the periods of hospitalisation of the Sponsor. The fact that no information,⁴⁰ at all, or as to dates of hospitalisation of the Sponsor was given to the Tribunal by the applicant leaves open the inference that the applicant did not know those dates even approximately, because the applicant and Sponsor were not living together but rather living separately and apart, possibly on a permanent basis.
29. In any event, s.359C(1) allows the Tribunal to make a decision on the application without taking any further action to obtain additional information where information is not given before the time for giving has passed. There would appear to be no reason to doubt that the Tribunal had the letter of 5 December 2005, including, the date for the giving of information contained therein, before it, and was aware of that date. There is nothing in the submissions of the applicant which would indicate to the contrary.
30. The applicant has not established any error of law under ground 2.

Ground 3

31. The applicant alleges a breach of the requirements of natural justice. It is not apparent whether the allegation is of bias or of a breach of the hearing rule.

³⁹ CB 376-377 at paras. 42-46.

⁴⁰ As to the type of information which the applicant ought to have been able to provide, see the submission of Counsel for the Respondents: Transcript at 22, lines 13-21.

32. If the allegation is one of bias it has not been distinctly made nor clearly proved.⁴¹
33. Section 357A of the *Migration Act* provides that the relevant provisions of that Act⁴² exhaustively state the natural justice hearing rule in migration matters.⁴³
34. In circumstances where:
 - a) there was a hearing;
 - b) the applicant was invited to provide information relevant to the issues, including, in particular the Sponsor's condition;
 - c) the applicant was invited to respond to information which might have led to adverse findings;
 - d) three to four months passed between the seeking of the information referred to in (b) and (c) above and the Tribunal's Decision; and
 - e) the applicant failed to provide any, or any sufficient, information to satisfy the Tribunal that there was sufficient evidence to enable it to be satisfied that the applicant and Sponsor were living together or were not living separately and apart on a permanent basis,
35. there can be no finding by this Court that there was a breach of the requirements of natural justice under the *Migration Act*, or in any event.
36. The Applicant even concedes that the Tribunal "reached its conclusions by balancing the material before it".⁴⁴ The Applicant further concedes that the Tribunal decision was "made months after the hearing" and after the granting of extensions for the submission of evidence.⁴⁵
37. The Applicant, given ample opportunity, has simply not made out his case in this regard. It is not for the Tribunal to do so.

⁴¹ *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] 205 CLR 507 at 531.

⁴² Part 5 Division 5, ss.375, 375A, 376 and Division 8A.

⁴³ *Minister for Immigration and Multicultural and Indigenous Affairs v Lay Lat* (2006) 151 FCR 214; [2006] FCAFC 61.

⁴⁴ Contentions of Law and Fact of the Applicant, filed 14 November 2006, para. 44 ("Applicant's Contentions").

⁴⁵ Applicant's Contentions 4.12.

38. Ground 3 of the application is therefore not made out.

Ground 4

39. Ground 4 asserts that the Tribunal failed to take into account a relevant consideration, and, further, that the Tribunal's Decision was unreasonable.

40. The mental health of the Sponsor at the date of the Tribunal Decision is said to be the relevant consideration which the Tribunal failed to take into account.

41. The Tribunal did however did take into account the Sponsor's mental health. Not only did the Tribunal set out evidence of the Sponsor's mental health (such as it was on the evidence before the Tribunal),⁴⁶ but the Tribunal makes findings by reference to the Sponsor's mental health, as set out above.⁴⁷ The paucity of the available evidence was such that insignificant weight was able to be placed upon the Sponsor's mental health as a factor in determining whether the Sponsor was living with the applicant or living separately and apart on a permanent basis.

42. All of the above assumes that the Sponsor's mental health at the date of the Tribunal Decision was a relevant consideration. Of itself, it was not, because it is not a consideration identified by the *Migration Act*, rather than a matter arising from the particular facts of the case under consideration by the Tribunal.⁴⁸

43. The applicant also asserts under ground 4 that the Tribunal Decision was unreasonable. Unreasonableness of a "high level" is necessary to establish jurisdictional error.⁴⁹

44. In the Court's view there is nothing unreasonable about the Tribunal Decision. The Tribunal has considered the available evidence, weighed that evidence, and come to a conclusion on the evidence, specifically and relevantly, that it is not satisfied of the matter it is required to be

⁴⁶ The evidence set out by the Tribunal is neatly encapsulated at paras. 34.1-34.7 of the First Respondent's Outline of Submission filed 9 November 2006.

⁴⁷ See para. 16 above.

⁴⁸ *Abebe v Commonwealth* (1999) 197 CLR 510; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323.

⁴⁹ *NBKJ v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 238 at para. 9.

satisfied of, and therefore rejected the applicant's request for review of the decision of the delegate of the Minister. It may be that the Tribunal has not placed greater weight on some evidence than other evidence, however it is entitled to do that, provided it goes to answering the question before the Tribunal (which it did) and the Tribunal considers the correct question (which it did). No unreasonableness has been established by the applicant.

45. Ground 4 is therefore not made out.

Ground 5

46. This ground raises further natural justice issues, but no consideration of that issue is required additional to what is said in relation to Ground 3 above. The views expressed in relation to Ground 3 from paras. 33-36 above apply to Ground 5 and consequently no breach of natural justice is established.

47. Ground 5 is therefore not made out.

Ground 6

48. The applicant alleges under Ground 6 that the Secretary of the Department may not have forwarded the whole of the Department's file to the Tribunal.⁵⁰

49. No error founding jurisdictional review is disclosed. Failure by the Secretary of the Department to forward the file, or forward the whole of the file, is neither a precondition to the exercise of the Tribunal's review functions, nor jurisdictional error on the Tribunal's part.⁵¹

50. Ground 6 is not made out.

Ground 7

51. This ground was not pressed.

⁵⁰*Migration Act*, s.352(4).

⁵¹*WAGP v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 103 at paras. 48-67.

Ground 8

52. The applicant says that the Tribunal did not comply with s.359(1) of the *Migration Act* because it failed to have regard to information provided to the Tribunal in a letter dated 18 January 2006 by the applicant's authorised representative by way of response to a s.359 notice.⁵²
53. An examination of each of the above documents reveals that they convey little information concerning the Sponsor. The Tribunal had regard to the information contained in those letters⁵³ and accepted that the Sponsor may have had health issues. The Tribunal did however also refer to the lack of medical evidence concerning the Sponsor's illness, particularly any "mental conditions" and their nature or extent, and that that was a factor going to the weight of reliance it might place on the Sponsor's illness.⁵⁴
54. The Tribunal looked at the evidence in the context of the five year marital relationship between the applicant and the Sponsor, and the paucity of evidence surrounding that relationship, including a paucity of evidence about the Sponsor's health issues.
55. The Tribunal clearly had regard to and referred to the information before it, including information concerning the Sponsor's medical condition, and did so in the context of the issues that it had to decide, particularly whether or not there was a genuine and continuing relationship between the applicant and the Sponsor, and whether they were living together or separately and permanently apart.⁵⁵
56. Ground 8 is not made out.

Ground 9.

57. This ground asserts error of law by the Tribunal by refusal to consider exercising the powers under ss.353(1) or 363(1)(a) and (3)(a) of the *Migration Act*.
58. The Tribunal was entitled to proceed to make a decision without further notice or without making further enquiries under ss.359 and 363 of the

⁵² CB 347-354.

⁵³ CB 375-376 at paras. 40-46.

⁵⁴ CB 379, 380 and 383 at paras. 54, 56 and 63.

⁵⁵ CB 382-383 at paras. 61 and 62.

Migration Act respectively. The Court notes that there was no request by the applicant under s.362 for any evidence to be called. No duty is imposed by ss.359 or 363, and in circumstances where s.362 was not called in aid by the applicant, there is no jurisdictional error by the Tribunal in proceeding in the way that it did.⁵⁶ There was no failure to afford the applicant natural justice, and no breach of any of the provisions constituting the exhaustive statement of the natural justice hearing rule have been established by the applicant on the evidence.⁵⁷

59. Ground 9 is not made out.

Ground 10

60. The applicant asserts that the notice under s.359A was not given to him. The applicant had nominated Mr Chu as his authorised recipient.⁵⁸ An applicant is deemed to have been given a document if the document was given to the applicant's authorised recipient.⁵⁹ It is immaterial that the authorised recipient was not also a registered migration agent.⁶⁰

61. Ground 10 is not made out.

Ground 11

62. The applicant asserts that Mr Chu was treated as a registered migration agent by the Tribunal, and that material provided by Mr Chu was not information given by the applicant for the purposes of s.359A(4)(b) of the *Migration Act*.

63. The Tribunal did not however treat Mr Chu as a registered migration agent. He was merely an authorised recipient.⁶¹ Whilst Mr Chu was an authorised recipient, available correspondence is addressed to the applicant.

⁵⁶ See s.362(3); *Minister for Immigration & Multicultural & Indigenous Affairs v SGLB* (2004) 207 ALR 12 at 21-22 per Gummow and Hayne JJ; [2004] HCA 32 at para. 43 per Gummow and Hayne JJ.

⁵⁷ See Divisions 5 and 8A and ss.357A, 375, 375A and 376 of the *Migration Act*; *SZCIG v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCAFC 62; *Minister for Immigration & Multicultural & Indigenous Affairs v Lay Lat* (2006) 151 FCR 214; [2006] FCA 61.

⁵⁸ CB 229.

⁵⁹ *Migration Act*, s.379G(2).

⁶⁰ ss.379A and 379G. See also *Minister for Immigration & Multicultural & Indigenous Affairs v SZFDE* [2006] FCAFC 142 at para. 235 (“SZFDE”). That there was a successful appeal to the High Court in *SZFDE* but it related to fraud by the Migration Agent not these provisions.

⁶¹ *Migration Act*, ss.379A and 379G. See, for example, CB 376-377 at paras. 42-46 and 48 where Mr Chu was treated as the “applicant’s representative”.

64. The applicant is entitled to have an authorised recipient and to engage a person to assist or represent otherwise than before the Tribunal, and to do things on behalf of the applicant including receipt of documents in connection with the review.⁶²
65. There is no evidence that Mr Chu acted as other than an authorised recipient. In particular there is no evidence that he used, or purported to use, “knowledge of, or experience in, migration procedure” to assist the applicant. Mr Chu did not therefore give “immigration assistance”⁶³ to the applicant.⁶⁴
66. The Tribunal’s decision was based on a lack of evidence about a genuine and continuing relationship between the applicant and the Sponsor. The applicant has not identified any information provided by or through the authorised recipient, and not by the applicant himself, which was the reason or part of the reason for affirming the decision of the delegate of the Minister.

Conclusions

67. None of the grounds of the application have been made out. The application will be dismissed, with the applicant to pay the First Respondent’s costs.

I certify that the preceding sixty-six (66) paragraphs are a true copy of the reasons for judgment of Lucev FM

Associate: M Hewitt

Date: 12 November 2007

⁶²*Migration Act*, ss.366A(1)-(4) and 379G(1)(b).

⁶³*Migration Act*, s.276

⁶⁴ See also the exclusion in *Migration Act*, s.276(3)(d).